United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-7517

To be argued by:
KEVIN J. McKAY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ERNEST CORALLUZZO,

Plaintiff-Appellee,

-against-

NEW YORK STATE PAROLE BOARD and MEMBERS OF THE NEW YORK STATE PAROLE BOARD, individually and in their official capacity,

Defendants-Appellants.

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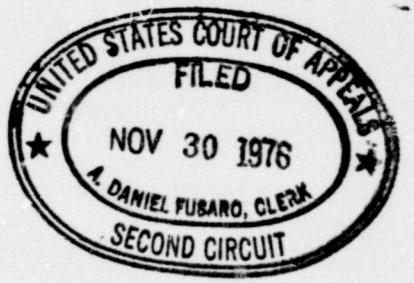

BRIEF FOR DEFENDANTS-APPELLANTS

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STATUTE

UNITED STATES COURT OF APPEALS
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ERNEST CORALLUZZO, :

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NEW YORK STATE PAROLE BOARD and MEMBERS OF THE NEW YORK STATE PAROLE BOARD, individually and in their official capacity, :

Defendants-Appellants. :

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BRIEF FOR DEFENDANTS-APPELLANTS

Questions Presented

1. Whether an inmate is entitled to due process protection at a minimum period of incarceration hearing?

2. If due process applies to a minimum period of incarceration proceeding, is an inmate entitled to receive a written statement of reasons for the Parole Board's decision, and also to examine all the evidence in his parole file, in unabridged form, which may be considered against him?

Preliminary Statement

This is an appeal from an order of the United States District Court for the Western District of New York (Curtin, Ch. J.) dated October 6, 1976, which granted plaintiff-appellee's request for an order directing the Parole Board to provide plaintiff with another minimum period of incarceration hearing (hereinafter "MPI") within sixty days of the date of the order. At the MPI rehearing, the Board must furnish plaintiff-appellee with (1) a statement of the reasons for its decision in setting his MPI date, (2) a statement of the essential facts relied upon by the Board, and (3) provide plaintiff an opportunity to examine all the evidence in his file, in unabridged form, which may be considered against him. On November 1, 1976, Judge Curtin granted a stay of his order pending appeal by the defendants-appellants to the United States Court of Appeals for the Second Circuit.

Statement of Facts and Proceedings Below

Plaintiff is presently incarcerated in the Attica Correctional Facility, Attica, New York pursuant to a judgment of conviction of the crime of criminal sale of a dangerous drug in the second degree rendered by the Supreme Court, Bronx County after a plea of guilty. He was

sentenced on February 28, 1975 to an indeterminate term of up to fifteen years under New York Penal Law § 70.00.

On January 15, 1976, plaintiff met with the Parole Board to have his minimum period of incarceration date set pursuant to New York Correction Law § 212(2) which requires that an inmate subject to an indeterminate sentence must meet with the Parole Board within nine to twelve months from the date his sentence commenced to have his MPI set.

Shortly thereafter, the Parole Board informed plaintiff by form notice that his MPI was set at five years from the date of his inception at the state facility, or February, 1980. (See A 16)* While no reasons were stated for his MPI date on the notice, plaintiff was served with a written copy of the reasons for the date on March 3, 1976. The reasons set forth by the Board for his five year minimum were as follows:

> "The case history makes it reasonable to conclude that this man's involvement in narcotic traffic is deep rooted and high level. Permanent separation from drugs seems improbable sooner than five years." (A 17)

In a complaint dated February 19, 1976, plaintiff alleged that the Board's determination of his MPI date was conducted in violation of his due process rights under the Fifth and Fourteenth Amendments of the United States Consti-

*Page references preceded by "A" refer to Appendix.

tution. (A 9). More specifically, the plaintiff argued that the Board's decision was deficient in that (1) no notice was given on what basis or evidence the Board would rely in denying parole; (2) plaintiff was not accorded an opportunity to view or examine the evidence relied upon by the Board or to cross-examine those who gave that evidence, or to offer rebuttal evidence; (3) plaintiff was secretly classified as a member of organized crime and not allowed to confront that fact or evidence for its basis; (4) the Board's decision was not made on the basis of sufficiently precise standards to provide for a fair and equitable and thoughtful decision or to allow a reviewing court a proper basis to review whether the Board considered permissible and relevant factors; and (5) the Board acted arbitrarily, capriciously and unlawfully in denying plaintiff's parole for five years.

The plaintiff sought a declaratory judgment under 42 U.S.C. § 1983 to the effect that the Board's consideration of plaintiff's release was conducted in violation of his rights under the Fifth and Fourteenth Amendments, and an order directing the Board to reconsider him for release in a manner consistent with his due process rights.

In an opinion dated August 6, 1976, the District Court directed the Parole Board to provide the plaintiff with another MPI hearing within sixty days at which he must be

furnished with the grounds for the Board's decision and the essential facts upon which the Board's inferences are based. (A 24). In footnote 2a of the opinion, the Court noted that, since an MPI hearing is similar to a parole release and parole revocation hearing, the defendants were to afford the plaintiff an opportunity to inspect the actual evidence against him.

On August 10, 1976, defendants moved to alter or amend the Court's August 6 decision and order pursuant to Rule 59(e) of the F.R.C.P. (A 34). Defendants argued that the Court's directive in footnote 2a, that plaintiff be permitted to inspect the actual evidence against him, should not be applied to non-adversary parole release or MPI proceedings.

In a decision dated October 6, 1976, the Court affirmed its August 6 opinion and ordered that, in addition to the other requirements mandated in its prior order, the defendants were directed to disclose to the plaintiff all the evidence, in unabridged form, which may be considered against him, absent a showing of good cause for keeping the information secret. (A 38). The Court extended the original date set for the new MPI hearing in its August 6 order and directed the Parole Board to provide plaintiff with another MPI hearing within sixty days. The Court also directed the defendants to file with the Court and serve on the plaintiff an affidavit

showing reasonable cause why an item in plaintiff's parole file should not be made available to him.

Opinion of the District Court

In its opinion dated October 6, 1976, the District Court, Curtin, Ch. J., held that an inmate at an MPI hearing has a sufficient interest at stake so as to require that minimal due process safeguards apply relying on this Court's decisions in United States ex rel. Johnson v. Chairman, New York State Board of Parole, 500 F 2d 925 (2d Cir.), vacated and remanded to be dismissed as moot sub. nom. Regan v. Johnson, 419 U.S. 1015 (1974) and United States ex rel. Carson v. Taylor, ____ F. 2d ____, slip opinion, Docket No. 76-2006 (2d Cir., July 22, 1976).

POINT I

THE REQUIREMENTS OF DUE PROCESS IMPOSED UPON THE BOARD OF PAROLE BY THE DISTRICT COURT ARE WITHOUT LEGAL OR FACTUAL SUPPORT. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT AN INMATE IS ENTITLED TO DUE PROCESS SAFEGUARDS AT A MINIMUM PERIOD OF INCARCERATION HEARING.

In concluding that an inmate facing an MPI hearing is entitled to due process safeguards, the District Court incorrectly analyzed the nature of the inmate's interest at an MPI proceeding as required by Mathews v. Eldridge, ____ U.S. ____, 44 U.S.L.W. 4224 (February 24, 1976) and Hannah v. Larche, 363 U.S. 420 (1960), and unwarrantedly extended United States ex rel. Johnson v. Chairman, New York State Board of Parole, 500 F. 2d 925 (2d Cir.), vacated and remanded to be dismissed as moot sub nom. Regan v. Johnson, 419 U.S. 1015 (1974) which merely held that prisoners are entitled to a written statement of reasons when parole is denied.

In resolving the question of whether due process applies to an MPI Proceeding, a number of factors must be considered, as elucidated by the Supreme Court in Mathews v.

Eldridge, supra at 4029:

> "....[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors. First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail....."

Due process is not a rigid concept which requires a hearing "in every conceivable case of government impairment of private interest", but rather "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria and Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 894, 895 (1961). The procedural protections of due process are only applied when necessitated by a particular situation. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

Viewing the facts at bar in light of these considerations, it is clear that due process does not

require that the rights due a prospective parolee at a parole release hearing be provided to an inmate at an MPI proceeding. The inmate's interest at stake when he goes before the Board for his MPI hearing neither rises to the magnitude of a parolee's interest confronted with parole revocation as in Morrissey v. Brewer, supra, nor a prospective parolee's interest at a parole release hearing as in United States ex rel. Johnson v. Chairman, supra. Unlike a parolee who has enjoyed conditional freedom and is facing reimprisonment or a prisoner being considered for parole who has a reasonable expectation of release, an inmate at an MPI hearing has no basis to anticipate freedom because whatever the Board decides his release will not be imminent.*

The purpose of the MPI proceeding is to determine when the inmate will become eligible for parole consideration. The issue of an inmate's release is not resolved at an MPI hearing, but only the time an inmate must serve before the Board considers his parole. The inmate has no legitimate expectation of release. The absence of an immediate threat to the inmate's liberty is strikingly evident at an MPI hearing.

*Pursuant to N.Y. Correction Law § 212(2), the Parole Board cannot release an inmate sentenced to an indeterminate term with no minimum, as plaintiff received, until he has served one year in prison.

The MPI hearing does not then and there cause any alteration in the conditions of an inmate's freedom. While the postponement of the date for parole consideration may extend the inmate's maximum term of imprisonment, it is not certain to do so, for the MPI date may be changed. See Wolff v. McDonnell, 418 U.S. 539, 561 (1974). The interest in the setting of the MPI date is too tenuous and remote to qualify for due process protection. See Board of Regents v. Roth, 408 U.S. 564, 570 (1972).

The setting of the MPI date is only tentative and may be changed repeatedly as noted by the Court in Walker v. Oswald, 449 F. 2d 481, (2d Cir. 1971) which remarked:

> "[t]he Board determination.... is merely an internal administrative action for the purpose of scheduling a case for parole consideration. That determination can be reviewed and changed at a later date, since the statute provides that the Board 'may at any time make subsequent determinations reducing such minimum period provided that the period shall in no case be reduced to less than one year.' (Correction Law § 212 subd. 2)." Walker, supra at 484.

Nor does the scheduling of a tentative date for parole consideration entail a "grievous loss" of either a liberty or property interest. See, e.g., Morrissey v.

Brewer, supra. The mere expectation of an early parole consideration date is not so vested as to result in a "grievous loss" if postponed for a period of time by the Board. Even if it was found that a "grievous loss "was suffered, this would not necessarily mandate that due process rights attach, as noted by the Supreme Court in Meachum v. Fano, ____ U.S. ____, 44 U.S.L.W. 5053, 5056 (June 25, 1976):

> "We reject at the outset that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the due process clause."

In Meachum v. Fano, supra, the Supreme Court held that the due process clause does not entitle an inmate to a factfinding hearing before he is transferred to another prison. An inmate's interest at an MPI hearing is similar to an inmate's expectation of remaining in one prison so long as he behaves in that they are both "too ephemeral and insubstantial to trigger procedural due process protections..." Meachum, supra at 5057.

Another important consideration in weighing whether to apply due process to an MPI hearing is the nature of the proceeding itself. Clearly, an MPI hearing is not conducted in an adversarial atmosphere. The Board has an identity of interest with the inmate inasmuch as it is seeking to rehabilitate and release him as soon as possible. Menechino v. Oswald, 430 F. 2d 403 (2d Cir. 1970), cert. denied 400 U.S. 1023 (1971); Scarpa v. United States Board of Parole, 477 F. 2d 278 (5th Cir. 1973), vacated and remanded to consider mootness, 414 U.S. 809 (1974).

The Parole Board's position was eloquently stated by Judge (now Chief Justice) Burger in Hyser v. Reed, 318 F. 2d 225 (D.C. Cir.), cert. denied sub nom. Thompson v. United States Board of Parole, 375 U.S. 957 (1963):

> "The Bureau of Prisons and the Parole Board operate from the basic premise that prisoners placed in their custody are to be rehabilitated and restored to useful lives as soon as in the Board's judgment that transition can be safely made. This is plainly what Congress intends. Thus there is a genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as

> possible. Here there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case. Here we do not have pursuer and quarry but a relationship partaking of parens patriae." (Hyser, supra at 237).

It is significant to note that procedural safeguards are presently being employed by the Board at MPI hearings. The inmate personally appears before the Board and generally discusses his criminal background and personal problems. The Board in return raises the problems that disturb them and which they feel may hinder the inmate's rapid rehabilitation. A stenographic record of the plaintiff's proceeding was also made so that it would be available for review if an inmate claimed that the Board discussed or considered impermissible issues or inaccurate facts.

The Board also reduces its decision on the MPI date to a written statement in which it states the reasons for its determination.* These procedural safeguards are more

*The Board of Parole has been providing inmates with a statement of reasons for the setting of their MPI date in accordance with the decision in Festus v. Regan, 50 A D 2d 1084 (4th Dept. 1975) which ordered that the Board provide inmate with statement of reasons.

than sufficient for the tenuous interest at stake at an MPI hearing and obviates the need for further due process protection. In discussing the nexus between a private interest and the degree of procedural safeguards it may demand, the Second Circuit in Frost v. Weinberger, 515 F. 2d 57, 66 (2d Cir. 1975) stated:

> "The Court's decisions can be fairly summarized as holding that the required degree of procedural safeguards varies directly with the importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances and inversely with the burden and any other adverse consequences of affording it."

In deciding that an inmate at a MPI hearing is entitled to due process safeguards, the District Court relied heavily upon the case of United States ex rel. Johnson v. Chairman, supra. However, Johnson did not involve or even discuss the nature of MPI hearings, but rather held that due process required that an inmate who had been denied parole be given a statement of reasons which would furnish

the grounds and facts relied upon by the Board.* In a tenuous and strained attempt to create an analogy, the District Court reasoned that the inmate's interest at stake at an MPI hearing was very similar to the interest of a prospective parolee at a parole release hearing. The District Court's comparison and reliance on Johnson is misplaced.

As we have seen, the interest involved at a MPI hearing is the tentative date for parole consideration which may be changed as opposed to a prospective parolee's interest in the "conditional entitlement" to parole. United States ex rel. Johnson v. Chairman, supra at 928. While the former involves, at most, a mere anticipation of release, the latter constitutes a reasonable expectation. Applying due process rights to an MPI hearing would transform it into an adversary hearing and unnecessarily burden the MPI decision making process.

*Contra, Scott v. Kentucky Parole Board, (unpublished order January 15, 1975), vacated and remanded to consider mootness, 45 U.S.L.W. 4009 (November 2, 1976); Scarpa v. United States Board of Parole, supra; Brown v. Lundgren, 528 F. 2d 1050 (5th Cir. 1976).

POINT II

THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT IN ADDITION TO RECEIVING A WRITTEN STATEMENT OF REASONS FOR THE MINIMUM PERIOD OF INCARCERATION DATE, PLAINTIFF IS ENTITLED TO EXAMINE ALL THE EVIDENCE IN HIS PAROLE FILE, IN UNABRIDGED FORM, WHICH MAY BE CONSIDERED AGAINST HIM.

Even assuming arguendo that an inmate is entitled to procedural due process rights at a MPI hearing and a written statement of reasons, these rights do not also require the Parole Board to provide an inmate with an opportunity to examine the unabridged contents of all the evidence in his parole file.

The District Court erroneously extended the decision in United States ex rel. Carson v. Taylor, slip opinion, Docket No. 76-2006, at 5075 (2d Cir. July 22, 1976) which granted a parolee the right to examine the actual documents used against him at parole revocation hearing. Recognizing the adversarial atmosphere of a parole revocation hearing and the substantial risk of recommitment, the Court in Carson, supra, held that the parolee's right to scrutinize documents containing incriminating information is as important as the parolee's right to

question adverse witnesses. Therefore, a parolee must be given access to documents which will be used against him unless the Board can demonstrate good cause for their nondisclosure.

The context in which the Court in Carson, supra, granted a parolee access to his file is radically different from the context of a MPI hearing, or for that matter a parole release hearing. At a parole revocation hearing, the Board is cast in an adversarial role because after charges are lodged against the parolee, the Board is required to resolve a disputed issue of fact - whether the parolee violated his parole. The parolee's conditional freedom hinges on the determination of this factual question.

At an MPI hearing, however, the Board has an interest in releasing the inmate as soon as feasibly possible, and is required to make a prognostic determination as to when an inmate should be considered for parole. See Scarpa v. United States Board of Parole, supra; Menechino v. Oswald, supra; Wiley v. United States Board of Parole, 380 F. Supp. 1194 (M.D. Pa. 1974); Barradale v. United States Board of Paroles and Pardons, 362 F. Supp. 338 (M.D.Pa. 1973).

This Court in Johnson, supra, affirmed part of its earlier opinion in Menechino v. Oswald, supra, by remarking on the distinction between parole release and parole revocation proceedings:

> ". . . . .a parole release as distinct from a parole revocation determination is not an adversarial proceeding in which 'charges' are preferred and disputed issues of fact presented, which might require that the weapons of legal counsel, cross-examination and other procedural protections be made available to the prisoner." Johnson, supra at 927.

Moreover, the Supreme Court in Morrissey v. Brewer, supra, at 482 Fn. 8, implied that the due process safeguards required at a parole revocation hearing need not be applied to an inmate at a parole release hearing by quoting from United States ex rel. Bey v. Connecticut State Board of Parole, 443 F. 2d 1079 (2nd Cir.), vacated as moot, 404 U. S. 879 (1971) wherein the Court distinguishes between the two proceedings. The Court in Bey, supra at 1086, stated:

> "It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom."

Similar actions to the case at bar wherein the plaintiff has attempted to enlarge the due process rights afforded an inmate at a parole release hearing, have been rejected by the Second Circuit. In Haymes v. Regan, 525 F. 2d 540 (2d Cir. 1975), plaintiff argued that the Board must disclose

the release criteria observed in its parole decision, in addition to the statement of reasons and facts upon which that decision was based. This Court held that "such disclosure is not, at this time, required as part of the minimum due process to be accorded the parole applicant", nor would such disclosure "appreciably enhance the protection accorded the parole applicant or add to the fairness of the proceeding." Haymes, supra, at 542 and 544.

The fact that the Parole Board is required to provide inmates denied parole with a statement of reasons for its decision pursuant to Festus v. Regan, supra, diminishes the need for disclosure of the inmate's parole file. The requirement of a statement of reasons will safeguard the inmate from arbitrary and capricious decisions and the Board's use of impermissible factors in arriving at its decision. Haymes v. Regan, supra at 543-544; United States ex rel Johnson v. Chairman, supra, at 929.*

* In Holup v. Gates, Slip Opinion, Docket Nos. 72-2013, 2018, 2045 (2d Cir. October 20, 1976), this Court intimated that the Parole Board need only provide a statement of reasons and facts relied upon after a parole release hearing. The Second Circuit remanded the case to the District Court to determine more fully the extent of the burden on the Board if redacted files had to be provided to prospective parolees.

In the case at bar, the reason stated by the Parole Board for its decision was that "[s]eparation from drugs seems improbable for five years". This reason is supported by the fact "that this man's involvement in narcotic traffic is deep rooted and high level." This reason, coupled with the Board's discussion of plaintiff's state and federal offenses in the sale of cocaine, is more than sufficient to inform plaintiff of the basis for the Board's decision and to permit a court or reviewing board to determine whether such a basis is permissible. (See minutes of MPI hearing, A 19).

In the recent case of Billiteri v. United States Board of Parole, slip Opinion, Docket No. 75-6120 (2d Cir. August 30, 1976), this Court held that an inmate at a parole release proceeding has no constitutional right to the information in the Parole Board's file. Other courts holding that an examination by a prisoner of his parole file is not mandated by the Fourteenth Amendment are: LaBonte v. Gates, 406 F. Supp. 1227, 1232 (D. Conn. 1976); Fisher v. United States, 382 F. Supp. 241 (D. Conn. 1974); Wiley v. United States Board of Parole, supra; Barradale v. United States Board of Paroles and Pardons, supra; see Cook v. Whiteside, 505 F. 2d 32 (5th Cir. 1974).

In Billiteri, supra, the plaintiff demanded to examine the presentence report and the examiner panel's report prior to any consideration by the Board of his eligibility for parole. Relying on its decision in Haymes v. Regan, supra, this Court stated that the inmate "has no such constitutional right to the infoamrtion in the Parole Board's file, including but not limited to the presentence report and the examiner panel's report." Billiteri, supra, at 5296.

The District Court, in support of its decision to allow plaintiff to examine his file, stated that an inmate's prison file frequently containes inaccurate information which could be rectified by disclosure. However, in our case, it appears from an order attached to plaintiff's brief in the District Court, that he had an opportunity to view and contest the contents of his probation report at sentencing. (A 37). The Supreme Court, Bronx County (Klein, J.) granted plaintiff's motion to strike a reference in his probation report that he had connections with organized crime. Thus, plaintiff's viewing of the contents of his probation report weakens his argument that he should be allowed to examine his parole file before an MPI hearing since his parole file at this point in time would consist largely of his probation report.

In Morrissey v. Brewer, supra and Wolff v. McDonnell, supra, where an inmate's right to conditional liberty or reduced sentence was considerably more vested than an inmate's anticipation for an early tentative date for parole consideration, all the court required, with respect to the communication of a decision, was a written statement of reasons and the facts relied upon by the Board.

Permitting an inmate to examine his parole file would not "appreciably enhance the protection accorded the parole applicant or add to the fairness of the proceeding." Haymes, supra, at 544. A written statement of reasons provides ample due process protection by facilitating judicial review, apprizing the inmate of adverse considerations, promoting thought by the decider, and promoting rehabilitation. United States ex rel. Johnson v. Chairman, supra.

As the Court in LaBonte v. Gates, supra, at 1232 stated:

> "The temptation to hold that all seemingly good ideas are constitutionally compelled is one which must be avoided, especially in an area such as parole where the Board is entrusted with extremely broad discretion and a grave responsibility. Cf. Jones v. Marshall, 523 F. 2d 132 (2d Cir. 1975)."

The Court in Haymes, supra at 543, followed this reasoning by stating that disclosure of the release criteria may be desirable, but it is not constitutionally mandated. Such logic should be followed in the instant case.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND JUDGMENT ENTERED FOR THE APPELLANTS.

Dated: New York, New York
November 30, 1976

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Audrey Gordon , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Defendants-Appellants herein. On the 30th day of November , 1976 , she served the annexed upon the following named person :

MR. PHILIP B. ABRAMOWITZ, ESQ.
556 Franklin Street
Buffalo, New York 14202

Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Audrey Gordon

Sworn to before me this
30th day of November , 1976

Kenneth M. Kay

Assistant Attorney General
of the State of New York